IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 115, 116

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM R. JOHNSON.

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

JACK SOMMERS, JAMES A. HARTIGAN, WILLIAM P. KELLY and STUART SOLOMON BROWN.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING.

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INDEX.

CITATIONS.

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PETITION FOR REHEARING.

Respondents submit this their petition for rehearing for the reasons hereinafter more fully set forth. It is pertinent, however, to note that the opinion of this Court lays great emphasis on the period that has expired since the original conviction, and the paramount importance of prompt enforcement of sentences. We do not need to dwell on the length of time during which the case lay undecided here. This Court is fully familiar with the record in that

regard. The suggestion that the right to seek a new trial has been abused is, on the record, also something less than fair. We assume that we are not expected to concede that appeal from denial of a motion for new trial is lacking in merit when we contend that the conviction is tainted by demonstrable perjury and when two long-experienced circuit court judges hold that false swearing by a material government witness is unerringly demonstrated by the evidence in support of such motion and that the conclusions of the trial judge to the contrary violate logic and reason. Counsel proceeded according to the rules as laid down by this Court. If there were any more rapid way to dispose of the motion and the amended motion,[1] it would be helpful if this Court would point it out or amend the rules to make such course clear. This is aside from the following points upon which we rely as eminently requiring reconsideration of this case.

I.

THE ORDER FOR MANDATE DEPRIVES RESPONDENTS OF THEIR RIGHT TO APPELLATE REVIEW OF THE ALTERNATIVE GROUND FOR NEW TRIAL.

The order for mandate at the foot of the opinion directs that the case—"be remanded to the district court to enforce the judgments against the petitioners." This deprives respondent of any appellate review of the ruling of the trial court on one of the alternative grounds for new trial. Respondents were entitled to new trial, as the trial

[1] In a case such as this where the subject of the false swearing is not merely an ephemeral occurrance but includes the alleged giving of a deed to property which the false witness nevertheless continues to enjoy as his own, it is, of course, inevitable that there will be continually appearing additional evidences of the perjury. The tax returns which occasioned the amended motion for new trial in this case are only an instance of others that may be expected to occur in the future. The continuing adverse effect on the public reputation of the administration of justice is obvious.

court impliedly recognized, if the evidence either showed (1) under the *Larrison* case doctrine that on the issue of false swearing it is reasonably clear that Goldstein swore falsely and that without such testimony the jury might have reached a different conclusion, thus depriving respondents of their constitutional right to a fair trial; or showed (2) that on the issue of guilt or innocence of the accused under the *Berry* case doctrine, the evidence is not *merely* cumulative or *merely* impeaching and is so material that it would probably produce a different verdict.

The trial court concluded on the evidence (1) that Goldstein had not sworn falsely and (2) that the evidence was merely cumulative or merely impeaching and not so material as to probably produce a different verdict.

These were obviously not *alternative grounds of decision;* they were rulings on *alternative grounds for granting the motion. As such, they were obviously both essential* to support the order denying the motion. Errors (including errors of law by the trial court in considering the affidavits of the government as admissible in evidence and interpreting the rule of law stated in the *Berry* case) were assigned the holdings as to the second ground (assignments of errors Nos. 4, 9, 25, 35, 37, 38, 40, 48, 50, 57, 58, 59, 60, AR. 191, 195, 196, 198, 199).

Because the circuit court of appeals found the trial court had abused its discretion in overruling the first ground, it did not pass on this second ground for new trial or upon the correctness of the trial court's ruling thereon, although it did refer to the obvious errors in law of the trial court in dismissing as "merely cumulative" any affidavits that happened to relate to an issue in dispute at the trial (AR. 230).[2]

This Court now holds by its most recent opinion that although the second ground for new trial was not considered by the circuit court of appeals, respondents nevertheless

[2] These errors alone justified the reversal by the circuit court of appeals since they relate to a large part of the evidence. The opinion of this Court does not even advert to that determination by the court below.

are to be denied new trial upon the decision, thus made final, of the district court without any appellate court having given any consideration to this second ground.

It is expressly stated by this Court (p. 3, footnote 4):

> "* * * An alternative ground for the Court's denial of the motion need not be considered here. * * * The alternative ground was that all of the so-called newly discovered evidence was either not newly discovered or merely cumulative or impeaching, and in any event would probably not produce a different result."

Of course, as pointed out above this was not an "alternative ground for the Court's denial of the motion." It was a holding essential to dispose of an alternative ground for granting the motion. "And this Court is under no duty to make law less than sound logic and good sense." *New York* v. *United States*, Sup. Ct. U. S., January 14, 1946 (90 L. Ed. 265, 267). That the Court's opinion confuses alternative grounds for relief and alternative grounds for decision is clear. It is equally clear that neither the appellate court nor this Court has passed on the question, although it was here relied on to sustain the judgment of the circuit court of appeals (Resp. Br. 88-96). The cause should, therefore, be remanded to the circuit court of appeals so that it may pass on the questions reserved. *United States* v. *Ballard*, 322 U. S. 78, 88; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267-268; *Brown* v. *Fletcher*, 237 U. S. 583; *Grant* v. *A. B. Leach & Co.*, 280 U. S. 351, 363.

II.

THE ORDER FOR MANDATE ALSO MODIFIES THE PRIOR JUDGMENT OF THIS COURT AND WITHOUT HEARING DEPRIVES RESPONDENTS OF THE RIGHT OF REVIEW THERE RECOGNIZED.

At the foot of the opinion of this Court reversing the judgments of the circuit court of appeals which had in turn reversed the convictions of respondents on the original trial, this Court directed that the cause be—

"remanded to the circuit court of appeals for proper disposition in accordance with this opinion" (319 U. S. 503, 520).

This Court there recognized that respondents were entitled to judicial review of numerous assignments of error with respect to the proceedings on the original trial which had not then and have not yet been considered by either the circuit court of appeals or this Court.

But the opinion of this Court filed February 4, 1946 now directs that the case be—

"remanded to the district court to enforce the judgments against the petitioners."

This direction for mandate unjustly penalizes respondents for having sought to vindicate their constitutional right to a fair trial.

Many of the errors assigned and relied upon by the defendants in the original appeal to the circuit court of appeals from the judgments of conviction were directed to matters arising in the course of the trial. With three exceptions none of them were found by the circuit court of appeals necessary to be considered. These were expressly reserved by the circuit court of appeals when it reversed the conviction. *United States* v. *Johnson*, 123 F. 2d 111, 128. They were relied upon in this Court to sustain the judgment but this Court did not pass upon any of the assigned errors not discussed by the circuit court of appeals. In accordance with the usual practice to which citation is made above (p. 4), the order for mandate included in the opinion of this Court directed that the cause be "remanded to the circuit court of appeals for proper disposition in accordance with this opinion" 319 U. S. 503, 520. Respondents rely on and believe that these assigned but as yet unconsidered errors then left open for consideration by the court below clearly show that reversal of the judgments of conviction is required.

Respondents believed that the constitutional right to a fair trial extends to them, that it is more than an abstraction, and that it might properly be asserted with vigor in the courts. They took as being more than platitudes statements such as that recently made by this Court in *In the Matter of Michael* (Sup. Ct. U. S. November 5, 1945):

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial."

and in *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318:

> "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted * * * "

In *United States* v. *Atkinson*, 297 U. S. 157, 160, this Court emphasized the importance of correcting errors if they "seriously affect the fairness, integrity or public reputation of judicial proceedings." And this same paramount objective was reaffirmed in *Johnson* v. *United States*, 318 U. S. 189, 200.

Upon the filing of this Court's judgment June 7, 1943, defendants had newly discovered evidence that they believed demonstrated perjury of the key Government witness. (To this day neither the dissenting Judge Minton in the court below nor any member of this Court has indicated a contrary view as to the effect of the evidence.) Accordingly, respondents, without then pressing for review of the remaining assignments of error, but without waiving them, promptly moved in the circuit court of appeals to remand to the district court in order there to move for new trial. Nothing in this Court's most recent opinion suggests they should for any reason have delayed longer in so doing. Indeed, the emphasis is on expedition in the making of such motions.

Neither on the petition nor on the writ, was any question raised as to the correctness of this Court's prior mandate or as to respondents' right to appellate review of their remaining assignments of error with respect to the original trial. Nevertheless, this Court now directs that the case "be remanded to the district court to enforce the judgments against the respondents".

Apparently because respondents have fought stubbornly for what they believed to be right and to correct what two circuit judges have found to be a clear and highly prejudicial wrong, they are to be penalized, and deprived of all right to an appellate review of the errors of the court during the course of the original trial. Such a result is foreign to the genius of our judicial system. It should be corrected.

III.

THE DECISION OF THE COURT DEPRIVES RESPONDENTS OF A NEW TRIAL ON A GROUND NOT ADVANCED BY THE GOVERNMENT AND ON WHICH RESPONDENTS HAVE HAD NO OPPORTUNITY TO BE HEARD.

The disturbing element in this Court's opinion is that it decides the case on a point of law in which respondents have never been heard. The point was not raised in the petition of the Government; nor was it specified as error or argued by the Government on the merits. Yet this Court states in its opinion (p. 3) that it was this question that motivated grant of the writ:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motion for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari."

Although there was no hint of this question in the Government's petition, this Court gave no indication, either at the

time of granting the writ or later, that it desired argument on this question. Nor on oral argument in this Court were any of the many questions directed to respondents' counsel even remotely related to this point on which the case is now made to turn.[3]

The Government assumed that the abuse of discretion rule applies in the case of a motion based on newly discovered evidence (Gov't Br. 68).

The Government also conceded (Br. 75-76):

> "Abuse of discretion consists of arbitrary action—action which is unreasonable, against logic and for which there is no justification in the facts or inferences to be drawn therefrom. Thus, as respondents have urged (see R. 502) and as the court below held on its first opinion on review of respondents' motion, the appellate court's function, in respect of factual issues, is to determine whether the trial court's conclusions from the evidence are unreasonable, arbitrary or capricious."

Significantly the Government also conceded (Br. 77):

> "In exercising that function *the appellate court must of course consider and in a sense weigh the evidence*, but its consideration of the evidence must be directed toward a determination of *whether there is any justification or basis in reason for the trial court's conclusions.*" (Emphasis supplied)

And the Government put the issue when it said (p. 72-73):

> "* * * the majority frankly abandons any attempt to determine whether the trial court's factual conclusions are reasonable; * * * Nowhere in their opinion do the majority state that the trial court's conclusions are unreasonable, arbitrary or capricious."

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[3] Indeed, the Government's brief stated the question to be "Whether the *trial court* abused its discretion in denying respondent's amended motion for a new trial purportedly based on allegedly newly discovered evidence that a Government witness testified falsely at respondents' trial". (Emphasis supplied) There were no specifications of error, of course.

On this issue, as thus presented, this Court has found against the Government, for the opinion states (p. 3):

> "The majority of the court reviewed parts of the affidavits and concluded from them that *the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable.*" (Emphasis supplied)

But this Court now states as controlling a new and different rule (p. 4):

> "But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motion for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren* v. *United States*, 217 U. S. 509; *Holt* v. *United States*, 218 U. S. 245; *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 481."

(1) The Reasoning of the Fairmont Case Has No Application.

Citation now of the decisions relied upon by this Court ignores twelve years development in the law and the distinctions in fact which eliminate the technical difficulties stated in the *Fairmont* case as impeding review of orders on motion for new trial.

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[4] Of course the opinion of the appellate court could not within any reasonable bounds detail each and all of the individual affidavits. The unreasonableness of the action of the District Court was sufficiently disclosed when it appeared that the credence given to certain of the principal affidavits of Goldstein and the discredit attached to contradicting affidavits introduced by the respondents was without any justification in logic or reason.

[5] In *Holmgren* v. *United States*, 217 U. S. 509 (1909) the motion for new trial was addressed to error in the conduct of the trial in permitting the indictment to be taken to the jury room with indorsement showing defendant's prior conviction on one count and order for new trial. Treating the question as a possible matter of plain error, although not properly raised in the record, the court held on the merits that no prejudice resulted. In *Holt* v. *United States*, 218 U. S. 245, 250-251 (1910) the trial court denied motion for new trial on the ground that jurors had been allowed to sepa-

In *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 481 (1933), the plaintiff moved for new trial on the ground that if it was entitled to judgment, the evidence clearly required judgment on the verdict found much in excess of the one dollar quoted. This Court held (p. 481):

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions."

Four reasons for the asserted rule are stated (287 U. S. 474, 481-482):

(1) The Judiciary Act of 1789, sec. 22, provided that there should be "no reversal in either (Circuit or Supreme) court on such writ of error * * * for any error in fact."

(2) The Seventh Amendment: "No fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

(3) Historical limitation of the writ of error to only those matters within the record of which the motion for new trial was not a part.

(4) The granting or refusing of a motion for new trial is a matter within the discretion of the trial court.

But no rule is any stronger than the reasons that support it. Research of which this Court obviously has not had the benefit demonstrates that none of the above reasons advanced in the *Fairmont case* (1933) now obtains with respect to motions for new trial directed to the issue whether false swearing has deprived of the Constitutional right to a fair trial:

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rate and had read articles in the daily paper with respect to the case. The court said (p. 251): "We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as ground for reversal, except in very plain circumstances indeed."

(1) Section 22 of the Judiciary Act of 1789 (carried into 28 U. S. C. sec. 879) made applicable to the substituted appeal (28 U. S. C. Secs. 861a, 861b), it has only recently been held by this Court, does not apply to criminal cases. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 27, 39, n. 3 (1943).[6]

(2) The motion for new trial presented no jury question within the Seventh Amendment and no jury has ever passed on the question presented. Manifestly, inapplicable, therefore, is the inhibition of the Seventh Amendment against re-examination of any "fact tried by a jury" other than according to the common law. Cf. *Parsons* v. *Bedford*, 3 Pet. 443, 447-448.

(3) By Section 269 of the Judicial Code as amended by Act of February 26, 1919, c. 48, 40 Stat. 1181 (28 U. S. C. sec. 391) the record is now amplified so as to include motion for new trial. *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 482; *Harrison* v. *United States*, 7 F. 2d 259, 262 (C. C. A. 2 1925).

(4) Exercise of so-called discretion by the trial court on motion for new trial with respect to questions not passed upon by the jury and not otherwise presented to the court is subject to appellate review. Regard for the historical development of the rule demonstrates that the so-called abuse of discretion rule governing appellate review was evolved as a means of liberalizing the so-called doctrine that rulings on motion for new trial lay in the sole discretion (meaning jurisdiction) of the trial court. The same historical development when traced also discloses that the later "rule" is a mere statement of the result of application of the three other technical rules referred to in the

[6] It is pertinent to note that the so-called doctrine that new trial is a matter of discretion grew up at a time when this Court had no review power over criminal cases except on division of opinion in the circuit courts. See *United States* v. *Sanges*, 144 U. S. 310, 321.

Fairmont case which are, as shown above, either outmoded or inapplicable here.[7]

The rule that grant or denial of new trial "rested in the sole discretion of the trial court and are not subject to review by writ of error" was obviously harsh in cases where newly discovered evidence or new matters never before considered were being brought forward by such motions. As a consequence, the courts began to scrutinize with minute care the question of whether the trial court had exceeded its jurisdiction or improperly refused to accept jurisdiction, and by rulings in the nature of prohibition or mandamus directed further consideration of certain cases, using the phraseology, however, "abuse of discretion" which meant there had been an improper usurpation or rejection

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[7] The earliest statement by this Court appears in *Henderson* v. *Moore*, 5 Cr. 11, where on writ of error dealing with a motion of the plaintiff for new trial based on affidavits tending to prove the full amount of the obligation sued upon to be due and surprise by unexpected testimony at the trial, Marshall, C. J., said that this Court had decided at the last term, "that a refusal by the court below to grant a new trial was not error." This obviously referred to the fact that action on a motion for a new trial was not included in the record on writ of error. In *Marine Ins. Company* v. *Young*, 5 Cr. 187, the trial court had refused to sign a bill of exceptions to the refusal to grant a new trial on the ground that the verdict was contrary to the evidence. Livingston, J., referred to the language of Section 22 of the Judiciary Act of 1789 saying: "Can this Court reverse for error in fact?" The opinion of the Court by Cushing, J., went off on the constitutional ground. In *Barr* v. *Gratz*, 4 Wheaton 213, 220, it was held that it had already been decided that refusal to grant a new trial "affords no ground for writ of error." In *Parsons* v. *Bedford*, 3 Pet. 433, 447, the Court again relied on the Seventh Amendment and Section 22 of the Judiciary Act. In *Zacharie* v. *Franklin*, 12 Pet. 151, 163, the Court for the first time said: "The granting or refusing of new trials rests in the sound discretion of the court below; and is not the subject of reversal in this Court." It is obvious that this and the other decisions cited by this Court in *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 482, n. 8, rely on one or more of the other technical grounds to which reference is made in the *Fairmont* case and which grounds were early recognized as applicable to the cases of the type in which the phraseology of "discretion" was later used.

of jurisdiction. *Mattox* v. *United States*, 146 U. S. 140; *Ogden* v. *United States*, 112 Fed. 523, 525 (C. C. A. 3 1902); *Felton* v. *Spiro*, 78 Fed. 576; *Dwyer* v. *United States*, 170 Fed. 160, 165 (C. C. A. 9, 1909). Now that all doubt of the appellate court's jurisdiction to review an order granting or denying a motion for new trial has been laid at rest the questions "What is discretion?" and "How is its abuse determined?" on appeal are no longer shrouded in obscurity. It is clear today that a District Court properly presented with a claim of invasion or deprivation of legal right *for the first time* on a motion for new trial does not have discretion to disregard applicable and controlling judicial precedents, statutes or constitutional provisions in disposing of the motion. The District Court is bound by such limitations in acting upon a motion for new trial just as he would be if the matter were presented by motion, objection, or request for ruling or order at any other stage of the proceedings. For example, it is plain from the opinion of this Court in *Glasser* v. *United States*, 315 U. S. 60, 87 that Glasser's claim that the jury had been improperly selected was entitled to precisely the same consideration when presented by motion for new trial based on after discovered evidence as it would have been had he made it on the first day of the trial. The action of the District Court will be reversed as an abuse of discretion if he fails to follow the applicable and controlling judicial precedents, statutes or constitutional provisions, and will be sustained as a proper exercise of it *only* if he does follow the law. *Glasser* v. *United States*, 315 U. S. 60; *Dressler* v. *United States*, 112 F. 2d 972 (C. C. A. 7).

The majority of motions for new trial are made today, as they were in the past, for the purpose of obtaining reconsideration by the trial court of his previous rulings. The vehicle for presenting claims of error in such rulings to the appellate court is assignment of such rulings specifically as error—not by assigning the denial of motion for new trial as error. In such a case the latter assignment is surplusage

on appeal because if the appellate court finds the rulings complained of did constitute reversible error it will reverse the judgment and direct a new trial on the basis of those assignments of error and will have no occasion to point out that the trial court repeated his error in denying the motion for new trial based upon those very assignments of error. If the appellate court finds on consideration of the specific assignments of error that the trial rulings complained of do not warrant reversal, it obviously will not hold that the trial court's refusal to grant a new trial on reconsideration of those same rulings constituted error. Implicit therefore in every appellate court opinion refusing to reverse with directions for a new trial upon assigned errors is the holding that it would have been no abuse of discretion for the trial court to have denied a motion for new trial based upon the trial rulings presented for review by such assignments of error. It is customary in such an opinion affirming the trial court, if the denial of such a motion has been assigned as error, for the appellate court to state that the denial of the motion did not constitute an abuse of discretion.

In every case in which on appeal a reversal with direction for a new trial is obtained there is implicit the holding that denial of a motion for new trial, based on the rulings relied on for reversal, would have constituted an abuse of the trial court's discretion; for obviously if the appellate court was required to reverse and direct a new trial the trial court was required to grant it when the same errors were called to his attention. It is not customary in opinions reversing with the directions for a new trial for the appellate court to advert explicitly ~~to the denial of~~ the motion for new trial, it being considered sufficient to discuss the specifically assigned errors on which said motion was predicated. Ordinarily, it is *only* in the case where the appellate court reverses for error raised *for the first time* in the motion for new trial (as in a motion based upon newly discovered evidence) that its opinion will contain explicit state-

ment that the trial court's denial constituted an abuse of his discretion.

It is noteworthy that *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 274, 481 and *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247 cited by this Court in its opinion (p. 4) do not deal with the "finding of fact" based upon newly discovered evidence. They involve the denial of motions for a new trial based solely on the claim that the verdict was against the weight of the evidence. In the *Socony* case the court said (p. 248): "Certainly denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review is [citing cases] in substance no more than that is involved here." It is clear that the phrase "error of fact" in these opinions applies only to the factual question of whether the verdict was against the weight of the evidence. These cases, therefore, do no more than reaffirm the uniform rule in federal courts that where the issue has been submitted to a jury a refusal of the trial court to set aside a verdict for claimed "error of fact" in that it was against the weight of the evidence, will not in view of the Seventh Amendment be disturbed on appeal.

In *Miller* v. *Maryland Casualty Co.*, 40 F. 2d 463 (C. C. A. 2 1930) it was pointed out that such a review would require the appellate court in effect to "decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements." Those cases do not in any way qualify the well established rule that a trial court's findings of fact based upon documentary evidence are subject to review on appeal.

No denial of the facts on which our motion was predicated is contained in any of the Government's evidence except for a few partial denials by Goldstein. In this proceeding, therefore, the affidavits and other exhibits, not con-

tradicted by any Government affidavit or exhibit, stand admitted (*Ogden* v. *United States*, 112 Fed. 523; *Powell* v. *Commonwealth*, 112 S. E. 657; *Piper* v. *State*, 124 S. W. 661). Where, as in this case, there has been an exhaustive investigation by the Government, not only of the facts and the affidavits, but of the "circumstances surrounding" the taking of them, the admission is not merely technical but factual.[8] These admitted facts alone are enough to prove the falsity of Goldstein's testimony beyond peradventure of doubt.

As this Court pointed out in *Glasser* v. *United States*, 315 U. S. 60, 87, the reviewing court is required to examine the evidence before it to determine the facts. To the same effect, is the holding of the 10th Circuit in *Pemberton* v. *United States*, 76 F. 2d 596, and to the same effect is the holding of the United States Court of Appeals for the District of Columbia in *Hamilton* v. *United States*, 140 F. 2d 679 and *Arbuckle* v. *United States*, 146 F. 2d 657. All of these criminal cases involving motions for new trial based on newly discovered evidence demonstrate that

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[8] No denial is made by Goldstein of any of the facts sworn to by the following fourteen witnesses or those contained in the following seven numbered exhibits, all of which relate to transactions in which Goldstein personally participated: Joseph Shaffron (R. 81); Walter Henrichsen (R. 91); Samuel Hare (R. 117); Frederick P. Kirschner (R. 122); J. Lawrence Holleran (R. 128); John W. Guild (R. 138); Beatrice Marsh (R. 163); Lester Weil (R. 174); Stewart Peters (R. 187); William R. Peacock (R. 188); Pearl Ferguson (R. 189); Marie Schmidt (R. 191); John Schmidt (R. 192); Eli Herman (R. 231); No. 49 (R. 194); No. 52 (R. 202-204); No. 52-A (R. 206-7); No. 51 (R. 200); No. 24 (R. 157); No. 22 (R. 145-149); No. 40 (R. 185). These facts, like those in the following 20 affidavits and other exhibits submitted by defendants which are not contradicted by any Government affidavits, stand admitted in this proceeding: No. 3-A (R. 96); No. 4 (R. 98); No. 6 (R. 102); No. 7 (R. 103); No. 8 (R. 104); No. 9 (R. 106); No. 10 (R. 108); No. 11 (R. 110); No. 14 (R. 119); No. 15 (R. 120); No. 17 (R. 124); No. 23 (R. 151); No. 25 (R. 162); No. 29 (R. 166); No. 30 (R. 167); No. 31 (R. 169); No. 32 (R. 171); No. 33 (R. 173); No. 35 (R. 176); No. 36 (R. 177); No. 38 (R. 179); No. 41 (R. 186); No. 45 (R. 190); No. 48 (R. 193); No. 51 (R. 200); No. 56 (R. 218); No. 57 (R. 219); No. 63 (R. 226); No. 66 (R. 230).

the duty of the appellate court to examine affidavits and other documentary evidence upon which a "finding of fact" by the trial court is based, is the same on an appeal from the denial of motion for new trial as it is on an appeal in which error is assigned to the denial of the highly discretionary motion for preliminary injunction, or to any other order of a trial court.

The absence in this case of the statutory and constitutional inhibitions upon review for motions of new trial to which reference is made in the *Fairmont* case amply justifies reconsideration of the decision of the Court in this case.

(2) The Circuit Court of Appeals Held as a Matter of Law that the Findings of the Trial Court Were Without Justification on the Facts or the Inference Properly to be Drawn Therefrom.

The reversal by the circuit court of appeals was not for error of fact within the meaning of the *Fairmont Glass Works case*. The circuit court of appeals found that the inferences and conclusions of the trial court were without basis in logic or reason (AR. 213, 214-220) and that it had wrongfully as a matter of law dismissed as "merely cumulative" (AR. 230) affidavits showing Goldstein's false testimony (R. 128, 138) which were uncontradicted (AR. 221, 225). And, referring to the affidavits of Goldstein, it concluded (AR. 225):

> "The proof therein contained affords no *substantial support* for a finding that he testified truthfully at the **trial.**"

No one has suggested that the affidavits of the Government agents tend affirmatively to show that Goldstein testified truthfully. And the affidavit of his son, Ted Goldstein, by its failure to corroborate Goldstein's testimony that Ted had given Johnson a quit-claim deed makes against Goldstein's testimony and certainly does not support it on this important phase of his false swearing.

It does not make much difference whether the formula "substantial evidence" or "any evidence" or "evidence

compelling to only one conclusion" be used. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway* v. *United States*, 319 U. S. 372. And it is clear that a trial court ruling on a motion for a directed verdict on the ground that the evidence is so overwhelmingly on one side that no reasonable man could find but one way is open for review by the appellate court as a matter of law. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *People's Savings Bank* v. *Bates*, 120 U. S. 556, 562; *Southern Pacific Co.* v. *Pool*, 160 U. S. 438, 440; *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 417. Cf. *Mt. Adams & E. P. Inclined Ry. Co.* v. *Lowery*, 74 Fed. 463.

Obviously it was necessary for the court to review the facts shown by the evidence in order to determine whether they with the inferences legitimately to be drawn therefrom did constitute evidence adequate to support the findings of the district judge.

This Court suggests that the only objection was to the trial court's findings on "conflicting evidence" and that this does not present a reviewable issue of law. It would appear to be elementary that even where it is conflicting evidence may, on the points in issue, be inadequate as a matter of law to sustain the ultimate finding of the trial court. Either a conclusion based on no substantial evidence must not be questioned, or else the appellate court can determine whether there is or is not substantial evidence to support the order of the trial court. Plainly this determination can be made only by examining the evidence in the record to determine whether the facts so shown and all inferences that may reasonably be drawn therefrom are, taken together, adequate as a matter of law to sustain the conclusion of the court below.

This Court without even purporting to examine, or refer to any evidence in the record, nevertheless, holds that the

trial judge's findings "were supported by evidence." This Court's calm assurance that the trial judge's findings were supported by evidence is singularly comparable to its citation in *Fairmont Glass Works* v. *Coal Co.*, 287 U. S. 474, 481, n. 5 of *Southern Railway Co.* v. *Walters*, 47 F. 2d 3, 7 (1931) in support of the proposition that there can be no review by the circuit court of appeals of denial for motion of new trial. There the circuit court of appeals after a close study of the record had reached the conclusion "we are of the view that there was substantial evidence to sustain the verdict". On certiorari, however, this Court had already held that the evidence on the issue "was so unsubstantial and insufficient that it did not justify a submission of that issue to the jury", and reversed. *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 194. Inferences there made were held to amount to sheer speculation unjustified in light of other facts shown by the evidence.

It would appear that such questions are not by any Court lightly to be determined by a "casual perusal" of the record. Particularly must this be true where, upon a question of perjury, the State itself has such a great interest.

(3) The Circuit Court of Appeals Had Power to Order New Trial for Error in Fact.

Even if the decision of the circuit court of appeals be regarded as a reversal of the trial court for error in fact because based on conflicting evidence, there are ample precedents for such action.

Where the evidence is entirely documentary the appellate court, equally with the trial court, is in as good a position to, and may, determine the facts and draw inferences of fact. The *Natal*, 14 F. 2d 382, 384 (C. C. A. 9) cert. den. 273 U. S. 748; *Uihlein* v. *General Electric Co.*, 47 F. 2d 997, 1001 (C. C. A. 7); *Nashua Mfg. Co.* v. *Berenzweig*, 39 F. 2d 896, 897 (C. C. A. 7); *Kaeser & Blair* v. *Merchants Ass'n*, 64 F. 2d 575, 576 (C. C. A. 6); The *Marsodak*, 94 F. 2d 339, 341 (C. C. A. 4); *United States* v. *Corporation of the President*,

etc., 101 F. 2d 156, 160 (C. C. A. 10); *Groves Laboratories* v. *Brewer & Co.*, 103 F. 2d 175, 178 (C. C. A. 1); *Himmel Bros.* v. *Serrick Corporation*, 122 F. 2d 740, 742 (C. C. A. 7); *Bowles* v. *Carnegie-Illinois Steel Corp.*, 149 F. 2d 545, 546 (C. C. A. 7). This rule has been given the same application in cases where the relief involved was discretionary. *Nashua Mfg. Co.* v. *Berenzweig*, *supra* (citing *Elbers et al.* v. *Chicago Printed String Co.*, 39 F. 2d 315); *Corica* v. *Ragen*, 140 F. 2d 496. The same rule was recently reiterated in *Letcher County* v. *Defoe*, 151 F. 2d 987, 990 (C. C. A. 6):

> "The evidence consisted entirely of written instruments and other writings which a reviewing court is competent to interpret, and is not precluded from doing so by Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. It remains free to draw the ultimate inferences and conclusions which evidentiary findings reasonably induce. *Kulen* v. *Princess Lida of Thurn & Taxis*, 3 Cir., 119 F. 2d 704; *Reinstine* v. *Rosenfield*, 7 Cir., 111 F. 2d 892. Indeed, it is the duty of the reviewing court to review the evidence in order to determine whether decision below was or was not clearly erroneous, and that duty becomes the more imperative where the trial court has had no occasion to observe witnesses or to judge of their credibility in arriving at a factual basis for decision."

The same rule is applicable in criminal cases and the decision of this Court to the contrary in the instant case would appear to overrule *sub silentio* two recent cases in the Court of Appeals for the District of Columbia. In *Hamilton* v. *United States*, 140 F. 2d 679 (1944) the Court not only reviewed but reversed the trial court's denial of a motion for new trial based on a finding of fact on newly discovered and conflicting evidence. The court, reviewing the trial court's interpretation of one of the defendant's affidavits, concluded (p. 681):

> "This does not seem to us a correct evaluation of the statement of Thelma Matthews as new evidence."

Also applicable is the statement in the same decision (pp. 681-682):

> "An affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused. Ambiguities should not be resolved in favor of the prosecution without inquiry of the proposed witness. This is particularly true in a case where the sole evidence to support a conviction is the word of the arresting officer, and where in addition the prosecution without any apparent reason has declined to produce corroborating evidence which the record shows might have been offered. *Under such circumstances we think it was an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut.*" (Italics supplied.)

Again in *Arbuckle* v. *United States*, 146 F. 2d 657, the Court of Appeals for the District of Columbia held that a single item of newly discovered documentary evidence inconsistent with the testimony of a government witness adequately fulfills the requirement as to the showing of falsity of the witness's testimony and dictated a reversal of the trial court's denial of the motion for new trial.

It is to be noted that it seems plain that the fact that review is by writ of error does not *per se* prevent review of errors in fact that might under some circumstances be triable by a jury. As the rule has been stated by this Court, it is apparent that it is subject to no rigid restrictions such as would be imposed by a rule that questions of law only are reviewable on writ of error. In *Holt* v. *United States*, 218 U. S. 251, it is stated:

> "We are dealing with a motion for a new trial, the denial of which cannot be treated as more than a matter of discretion or as ground for reversal, *except in very plain circumstances indeed.*" (Emphasis supplied.)

And in the instant case this Court states (p. 3):

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remains undisturbed *except for most extraordinary circumstances*, we granted certiorari." (Emphasis supplied.)

Obviously, the exceptions indicate the existence of no rigid rule. That the court reviewing denial of a motion for new trial may consider errors of fact, not within the record made on the trial proper, but rendering illegal and invalid the whole proceeding is recognized in 2 *Bishop, New Criminal Procedure* (2nd ed.) sec. 1369, and is borne out in *Cornhill's Case*, 1 Lev. 149, 83 Eng. R. Repr. 342 and *Anonymous*, 3 Salk. 147, 91 Eng. R. Repr. 743. See 1 *Holdsworth, History of English Law*, pp. 370-371.

CONCLUSION.

It is submitted that respondents on their amended motion for new trial have been deprived of appellate review of one of the alternative grounds for granting their motion.

It is also clear that by the form of the direction for mandate contained in the opinion of this Court, respondents have been wrongly deprived of review of their numerous assignments of error on appeal from their convictions directed to the proceedings on the original trial. Their right to have these assignments considered by the circuit court of appeals was impliedly recognized in the direction for mandate contained in the opinion of this Court reversing the circuit court of appeals on the merits. To now deprive them of that right unjustly penalizes them for seeking a fair trial.

The peculiarity of the question of fact presented by a motion for new trial on false swearing—an issue never considered by a jury—and the authorities cited above make plain that the decision of this Court is founded on prece-

dents the pertinence of which is questionable. In any event respondents should at least be afforded a hearing on a question which was never indicated as constituting a question on review in this Court and at most merely lurked in the record.

Respectfully,

HOMER CUMMINGS,
Attorney for William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

WILLIAM J. DEMPSEY,
Attorney for William R. Johnson, Respondent.

HAROLD R. SCHRADZKE,
Attorney for Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

February, 1946.

CERTIFICATE OF COUNSEL.

I, Homer Cummings, counsel for the above-named respondents, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

HOMER CUMMINGS,
Counsel for William R. Johnson, Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown, Respondents.

SUPREME COURT OF THE UNITED STATES.

Nos. 115 and 116.—October Term, 1945.

115	The United States of America, Petitioner, *vs.* William R. Johnson.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.
116	The United States of America, Petitioner, *vs.* Jack Sommers, James A. Hartigan, William P. Kelly and Stuart Solomon Brown.	

[February 4, 1946.]

Mr. Justice Black delivered the opinion of the Court.

On October 12, 1940, after a federal district court trial lasting more than six weeks, a jury found respondent Johnson guilty of wilfully attempting to defeat and evade a large part of his income taxes for the calendar years 1936-1939 and of conspiring to do so; the other respondents were convicted and sentenced for conspiring with and aiding and abetting him.[1] From the time of these convictions until now, enforcement of the sentences was delayed by persistent efforts to obtain a new trial. Though there has been no second trial the case is here for the third time.

September 21, 1941, was the date when the Circuit Court of Appeals first reversed the conviction, one judge dissenting. 123 F. 2d 111. June 7, 1943, we reversed and remanded the case to the Circuit Court of Appeals, 319 U. S. 503. Respondents then asked that Court to remand the case to the trial court to permit a motion for a new trial on the ground of newly discovered evidence.[2] The Circuit Court acting pursuant to Rule II(3) of the

[1] The respondent Brown was found guilty only on the conspiracy count and counts 3 and 4, the substantive counts for 1938-1939.

[2] Previously respondents had applied to Mr. Justice Frankfurter for a stay of mandate pending petition for rehearing. Mr. Justice Frankfurter's denial of the motion specifically stated that it was to be "without prejudice, however, to the consideration and disposition by the United States Circuit Court of Appeals for the Seventh Circuit of any motion filed under Rule 2(3) of the Criminal Appeals Rules" (R. 10).

Criminal Appeals rules[3] remanded the case and on October 29, 1943, respondents, with leave of the trial court, filed a motion for a new trial. The respondents alleged that the newly discovered evidence proved that Goldstein, a government witness at the trial, was unworthy of belief and had committed perjury in testifying that certain properties were purchased by him on behalf of Johnson and with money supplied by Johnson. To support their charges against Goldstein respondents offered numerous affidavits. The Government filed an answer to the motion and a number of counter-affidavits. And among the papers before the court were affidavits by Goldstein reaffirming his testimony at the trial. The trial judge in a carefully prepared opinion covering fifty-six pages of the record, gave thoughtful consideration to each affidavit, reached the conclusion that none of them showed that Goldstein had perjured himself, and found both from the new affidavits and his own knowledge of the original six-weeks trial, that Goldstein's testimony was true. The motion for a new trial was consequently denied.

The Circuit Court of Appeals affirmed. 142 F. 2d 588. It unanimously held that it could not substitute its judgment on the facts for that of the trial judge; that it did not have power to try these facts de novo; that it could review the record for errors of law, to determine, among other things, whether the trial judge had abused his discretion; that a review of the new evidence in the record did not inevitably lead to the conclusion that Goldstein had testified falsely; that the trial judge had not reached his conclusion "arbitrarily, capriciously, or in the misapplication of any rule of law" and hence had not abused his discretion. The respondents thereupon filed a second petition for certiorari in this Court. While this petition was pending, respondents presented papers informing us that they had discovered still more new evidence tending to discredit Goldstein's original testimony. We deferred consideration of their case, which we later dismissed, 323 U. S. 806, and they, after obtaining a second remand from the

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[3] "II. *Motions.*

"(3) A motion for a new trial solely upon the ground of newly discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time after final judgment."

Circuit Court of Appeals, filed an amended motion for new trial in the District Court. The trial court again wrote an opinion analyzing each new affidavit in detail. These additional affidavits contained statements which had they been offered as testimony at the original trial would have been admissible and relevant to discredit Goldstein's and buttress Johnson's testimony. At least some of the facts set out in the affidavits had not been discovered until shortly before the amended motion was made. But the trial court concluded that the new affidavits failed to prove that Goldstein had committed perjury, and that consequently the basic ground for the motion—that there was new evidence showing that Goldstein had perjured himself—was without foundation.[4] That court found again that the new and old evidence taken together affirmatively showed that Goldstein had been a truthful witness. This time, however, the Circuit Court of Appeals reversed with one judge dissenting. 149 F. (2d) 31. The reversal rested basically on the Court's belief that the trial judge had erroneously found that Goldstein did not commit perjury. The majority of the Court reviewed parts of the affidavits and concluded from them that the trial judge's finding that Goldstein did not commit perjury was illogical and unreasonable. The majority substituted its own finding that Goldstein's original testimony was "unerringly false" and held that the trial judge's contrary conclusion amounted to an abuse of discretion. Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances, we granted certiorari.

In our opinion the Circuit Court of Appeals erred. The appeal to that court was so devoid of merit that it should have been dismissed. The crucial question before the trial court was one of fact: Did the new evidence show that Goldstein's original testimony was

[4] An alternative ground for the Court's denial of the motion need not be considered here. For as will be seen we think that the trial court's findings that the so-called new evidence failed to show Goldstein's perjury should not have been upset. The alternative ground was that all the so-called newly discovered evidence was either not newly discovered, or merely cumulative or impeaching, and in any event would probably not produce a different result. In this aspect of the case, the trial court, as did the Circuit Court of Appeals in its first opinion, relied on the frequently quoted and followed rule announced in Berry v. Georgia, 10 Georgia 511.

false.[5] The trial judge after carefully studying all the evidence found that there was nothing to show perjury on the part of Goldstein, that Goldstein had in fact told the truth, and concluded that a new trial was not warranted. The trial court thus answered the above question in the negative. Two judges of the Circuit Court of Appeals thought that the evidence compelled an affirmative answer. But it is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren* v. *United States*, 217 U. S. 509; *Holt* v. *United States*, 218 U. S. 245; *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247; *Glasser* v. *United States*, 315 U. S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact.

Determination of guilt or innocence as a result of a fair trial, and prompt enforcement of sentences in the event of conviction, are objectives of criminal law. In the interest of promptness, Rule II(2) of the Criminal Appeals Rules requires that motions for new trial generally must be made within three days after verdict or

[5] In addition to questions involving the merely impeaching or cumulative effect of the evidence, which we have already indicated need not be considered here, see note 2, *supra*, we also need not consider what criteria should have guided the court in passing on the motion, had respondents actually shown that Goldstein recanted his testimony or that he committed perjury. Compare Larrison v. United States, 24 F. 2d 82, with Berry v. Georgia, *supra*, note 2. For as later appears we consider the District Court's finding, that Goldstein's testimony was not shown to have been false, not reviewable. That was sufficient to warrant a denial of the motion.

finding of guilt, and Rule III requires appeals to be taken within five days. But motions for new trial on the ground of newly discovered evidence have been more liberally treated. They can, under Rule II(3) be made at any time within sixty days after judgment, and in the event of an appeal, at any time before final disposition by the Appellate Court. This extraordinary length of time within which this type of motion can be made is designed to afford relief where despite the fair conduct of the trial, it later clearly appears to the trial judge that because of facts unknown at the time of trial, substantial justice was not done. It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit. This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The Circuit Court of Appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside.

The appeal to the Circuit Court of Appeals was instituted by notice of appeal under Rule III of the Criminal Appeals Rules. Rule IV gives the Circuit Court of Appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. *Ray* v. *United States*, 301 U. S. 158, 164; *Mortensen* v. *United States*, 322 U. S. 369. Under that Rule the Circuit Court of Appeals here, after studying the issues raised, and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.[6]

[6] Alberts v. United States, 21 F. 2d 968; Corrigan v. Buckley, 271 U. S. 323, 329; Avent v. United States, 266 U. S. 127, 131; Sugarman v. United States, 249 U. S. 182, 184; Zucht v. King, 260 U. S. 174, 176; Campbell v. Olney, 262 U. S. 352; Seaboard Airline Ry. Co. v. Watson, 287 U. S. 86, 90, 92; Salinger v. United States, 272 U. S. 542, 544; Kryder v. Indiana, 205 U. S. 570; Cady v. Georgia, 323 U. S. 676.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court to enforce the judgments against the petitioners.

It is so ordered.

Mr. Justice JACKSON and Mr. Justice MURPHY took no part in the consideration or decision of this case.